# Supreme Court of the United States

OCTOBER TERM, 1938.

No. 30.

THE COLORADO NATIONAL BANK OF DENVER and GERTRUDE HENDRIE GRANT, Executors of the Estate of Edwin B. Hendrie, deceased,

*Petitioners,*

v.

GUY T. HELVERING, Commissioner of Internal Revenue,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

## MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*.

C. ALEXANDER CAPRON,
CHARLES ANGULO,
PHILIP M. PAYNE,
*Amici Curiae.*

THE COURT PRESS, N. Y. C.

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## *Motion for Leave to File a Brief as Amici Curiae.*

MAY IT PLEASE THE COURT:

The undersigned respectfully move this Honorable Court for leave to file the accompanying brief in this case, as *amici curiae*.

C. ALEXANDER CAPRON,
CHARLES ANGULO,
PHILIP M. PAYNE,
*Amici Curiae.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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## BRIEF OF AMICI CURIAE.

This brief, by permission of the Court, and with the consent of counsel for the respective parties, is filed by the undersigned as *amici curiae* and on behalf of trusts not wholly dissimilar to those involved herein, for whom the undersigned are counsel.

It is presented in support of petitioners' contention that the trust fund in suit is not subject to the federal estate tax as one made "in contemplation of death".

We shall limit our discussion to what we conceive to be the underlying fallacy which pervades the Government's whole argument.

In the last analysis, what the Government is seeking is to have this Court depart from its ruling in the *Wells* case (283 U. S. 102) that the question of whether or not a transfer is made "in contemplation of death" is essentially a question of *fact* to be determined in the light of all the circumstances of the particular case.

The ultimate inquiry, of course, is as to the "state of mind" of the donor. Necessarily that state of mind can only be known as it may be *deduced or inferred* from his acts and declarations, and the other relevant circumstances of the case. These acts, declarations and the other circumstances, however, are merely *evidentiary* in their nature, and the ultimate question must always remain whether or not the "thought of death" was the controlling motive for the transfer. This of course is a question of fact.* (*McCaughn* v. *Real Estate Trust Co.*, 297 U. S. 606, 608.)

Hence there is no single circumstance, or set of circumstances, which can be said to be decisive and to establish as a *matter of law* in all cases, the presence of the particular state of mind which brings the transfer within the scope of the statute.

As was stated in the *Wells* opinion, at page 119:

> "There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in the light of his bodily and mental condition, and thus to give effect to the manifest purpose of the statute."

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* Of course, under the decisions, the question of whether there is any substantial evidence to support a finding of fact is a question of law. Certainly in the instant case, where the two-year statutory presumption does not operate, it may not be said that there was no substantial evidence to support the finding of the Board of Tax Appeals that the transfer was not made in contemplation of death.

In reality what the Government is asking is that certain inferences be drawn as a *matter of law* from given circumstances which in their nature are purely *evidentiary*. In other words, the Government wishes this Court to lay down the rule that the presence of the state of mind to which the statute is directed, must necessarily be inferred as a *matter of law*, because of the existence of a particular circumstance, even though such circumstance is at least consistent with a different motive.

Thus in the instant case, the Government in effect contends that the single circumstance that actual payments of income to the daughter were not to commence until the donor's death, results as a *matter of law* in making the trust one created "in contemplation of death". But it would seem obvious that the significance of that particular circumstance cannot be determined as a *matter of law*. Conceivably, at least, the selection of the time at which the payments of income to the daughter, were to commence was of secondary significance in the settlor's mind. The controlling motive for the transfer may have been to gratify his craving to speculate, unhindered by any conscientious scruples as to the moral obligation that he owed to his daughter and her children; whereas the *precise* terms of the particular provision to be made for them may have been viewed by him as being merely of secondary importance. Conceivably too, the selection of the date of death as the time at which the actual payments of income were to commence may have been motivated by a desire to preclude any claim on the part of future creditors that the trust was a mere colorable device under which donor's daughter would make the income available to him during his lifetime. What actually was the

significance of the selection of said date must be inferred from all the circumstances of the case; and thus it cannot be said that as a *matter of law* the presence of that particular circumstance establishes that the donor's controlling motive was the "thought of death".*

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*The Circuit Court of Appeals in its opinion in the instant case said:

> "The dominant purpose was to make provision for his descendants *after his death*, in the event his speculations proved tragic" (95 F. (2d), 160, 163, italics supplied).

It is respectfully submitted that in making the said statement the Circuit Court of Appeals was making a determination of fact. In reality what it was doing was scrutinizing and weighing the evidence and inferring therefrom that the deceased in his mind attached *controlling* significance to the selection of the date of his death as the time at which the actual payments of income to the daughter were to commence. As we have seen, it is at least conceivable that this may have been of minor significance in the settlor's mind. Conceivably the controlling consideration was to enable him to squander the rest of his fortune in speculation or otherwise, free from any moral qualms as to the obligation which he owed to his daughter and her children, and that the precise terms or form of the provision to be made for them was of minor significance. It would seem to be obvious, therefore, that the ultimate determination as to the donor's state of mind must necessarily depend upon the inferences which are drawn from all of the evidence in the case.

Incidentally, in the course of the opinion of the District Court in *Land Title & Trust Co.* v. *McCaughn*, 7 F. Supp. 742, 744, it seems to have been assumed, as being more or less obvious, that if a trust is created because "the donor mistrusts his own ability to take care of his property until his death and wishes to put it out of the way of dissipation by himself as well as his heirs", the motive is one associated with life, although not necessarily inconsistent with the existence of a contemporaneous "death" motive. Of course, it should be noted that in the *McCaughn* case the transfer was made within the two-year period.

The same fallacy is involved in the Government's argument that where the provisions of the trust instrument are similar to the provisions of the donor's will, the trust thereby becomes, as a *matter of law*, one made "in contemplation of death". Here again we submit that the similarity between the provisions of the trust instrument and the donor's will is merely a single circumstance which must be considered in connection with all of the other circumstances of the particular case, in order to ascertain whether the dominant motive for the transfer was the thought of death or whether the donor was actuated by some other motive desirable to him in life. In one sense, every transfer *inter vivos*, especially if the beneficiary was also the beneficiary under a pre-existing will, necessarily is a substitute in part for a testamentary disposition. But this manifestly is not the sense in which those words were used in the *Wells* and *Milliken* cases (283 U. S. 15, 102). As already stated, the statute requires the existence of a certain state of mind; and it is self evident that that state of mind may or may not exist notwithstanding that the provisions of the trust instrument are similar to those contained in a prior will of the settlor.

While the Government concedes (Brief, p. 19) that there is no evidence in the case at bar of any desire to avoid estate taxes, it nevertheless argues that a desire to avoid or minimize estate taxes would, if present, in and of itself and as a matter of law, constitute the transfer one "in contemplation of death." That argument has nothing whatever to do with this case. Possibly, the presence of any

such desire, would, like any other circumstance, be one to be considered and given its due weight in connection with all of the other circumstances of any particular case in which the question might be involved.

And so, we submit that, as stated in the extract from the *Wells* opinion which we have quoted above, there is no escape from the necessity of considering all of the circumstances of the particular case and deducing in the light thereof whether the "thought of death" was the dominant motive for the transfer. That, we submit, is essentially a question of *fact* to be determined by the trial tribunal.

The only circumstances to which the Government points as tending to support its contention that the transfer was made in contemplation of death are the following: (i) decedent's age at the time of the transfer (R. 33); (ii) the terms of the trust by which the transfer was made providing for the accumulation of the income until after the donor's death (R. 11); and (iii) that the decedent's will, executed on January 26, 1925 (R. 47), which was nearly two years before the transfer was made (R. 35), left his residuary estate to trustees for the benefit of his daughter and grandchildren, and their descendants, upon substantially the same terms set forth in the deed of trust by which the transfer was made (R. 45, 46).

This Court has determined that none of such circumstances establishes, as a matter of law, that a transfer was made "in contemplation of death".

As to the first, this Court said: "Yet age in itself cannot be regarded as furnishing a decisive test, for sound health and purposes associated with life, rather than with death, may motivate the transfer". *United States* v. *Wells*, 283 U. S. 102, 118. In the instant case it is not disputed that the donor was in sound health at the time of the transfer and lived over five years thereafter.

Similarly, this Court has held that, for the purpose of determining whether property transferred should be subjected to the estate tax, an absolute, complete and irrevocable gift *inter vivos* of a future interest* is of the same effect as an absolute gift of a present interest. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348. See, also, *Welch* v. *Hassett*, 90 F. (2d) 833, 839; *Frew* v. *Bowers*, 12 F. (2d) 625, 627.

Specifically this Court has held that a transfer in trust, with power in the trustee to accumulate income during the settlor's life, and to distribute the same upon his death, was not evidence that, in making the transfer, the donor was in any way influenced by the thought of death. In *Becker* v.

*In the instant case of course, a trust for the benefit of the daughter was irrevocably created at the time the trust instrument was signed. The donor reserved no interest in the trust. The transfer to the trustee was absolute and unconditional, and was for the benefit of the daughter. The only connection between the trust and the date of the donor's death was that that was the date selected as the time when the payments of income to the daughter were to commence, the income in the meanwhile being accumulated for the benefit of herself and her children.

*St. Louis Union Trust Co.*, 296 U. S. 48, the trust instrument left it to the discretion of the trustee (who was also the settlor) whether the income should be accumulated during the life of the settlor or distributed to the beneficiary (76 F. (2d) 851, 853), and further provided that in the event the settlor predeceased the beneficiary, the trust property (both principal and accumulated income) upon the death of the settlor should be absolutely distributed to the beneficiary. The District Court found that the motive of the decedent in creating the trust was to minimize his income tax "and at the same time to make provision for the distribution of the property to his children at decedent's death" (Commerce Clearing House Standard Federal Tax Service, Vol. III-A, 1934, pp. 9717-9718, 19210). Nevertheless, the Circuit Court of Appeals held that evidence that the decedent was in any way influenced in what he did, by the thought of death, was entirely lacking, and this Court said (296 U. S. 48, 52): "We are unable to find anything in the record which conflicts with the statement of the court below that evidence that the decedent was in any way influenced by the thought of death was wholly lacking."

Similarly this Court has held that "the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend" does not change the character of an irrevocable transfer. *Shukert v. Allen*, 273 U. S. 545. See, also, *Boyd* v. *United States*, 34 F. (2d) 488, 490.

There remains for consideration the question whether the similarity between the provisions of the deed of trust by which the transfer was effected and the provisions of the will previously executed by the donor is a circumstance from which it must be held, as a matter of law, that the transfer was made

"in contemplation of death". The decisions of this Court and of other lower federal courts are to the contrary. In the *Wells* case this Court mentioned (p. 109) the provisions of the testator's will, which had been executed by him before the date of the transfer there in question. Under the provisions of that will, the benefits which the children would have derived would have been substantially the same as those received by them as the result of the gifts in question, plus the amount which they received under the testator's will. The decedent there died within two years of the date of the transfer and the Commissioner assessed an additional estate tax with respect to the property so transferred. Notwithstanding this, the Court of Claims held (69 Ct. Cls. 485) that the transfer was not made in contemplation of death; and this Court refused to disturb that determination, in effect holding that none of the circumstances there presented required the conclusion that, as a matter of law, the transfer had been made in contemplation of death.

The decisions of other lower federal courts are to like effect. Thus, in *Tait* v. *Safe Deposit and Trust Co.*, 74 F. (2d) 851, the Circuit Court of Appeals for the Fourth Circuit held that a transfer was not made "in contemplation of death", notwithstanding the fact that it was made to the grantor's wife, who was the chief beneficiary under the grantor's will. And in *Poor* v. *White*, 8 F. Supp. 995, the court said: "The fact that upon the final distribution the property would go to her descendants after the death of the survivor of the beneficiaries is not enough to justify a finding that the transfer was made in contemplation of death, within the meaning of the statute imposing estate taxes" (p. 996). The decision was affirmed, 75

F. (2d) 35; 296 U. S. 98. See, also, *Estate of Sharp v. Commissioner*, 30 B. T. A. 532, 541.

The circumstance that the property was transferred by the donor to those persons who would have received it under a will previously executed, or that the property was transferred to the natural objects of the donor's bounty to be provided for by his will, may be a circumstance which should be considered by the triers of the fact, but it is not a conclusive test by which a determination may be reached as a matter of law, that the transfer was made "in contemplation of death".

We submit that such circumstance is of slight significance in most instances, for it would be strange to find an *inter vivos* gift of a material portion of one's property to others than the natural objects of the donor's bounty—to those who are dependent upon him and for whom he desires to make provision not only during his life but after his death. It must be expected that a person who creates an *inter vivos* trust will select as the beneficiaries the same persons whom he mentions in his will. When future estates are created, there can be but slight difference between the provisions of an *inter vivos* trust and a testamentary trust creating such future estates. The use of substantially the same language (if income beneficiaries and remaindermen be the same) is inevitable and unavoidable.

In order to escape the charge that a trust established *inter vivos* is "a substitute for a testamentary disposition", it is not necessary for one to change the beneficiaries of the trust or the character of the benefits conferred upon such beneficiaries.

The argument, that the single circumstance that the gift is made to one who is the natural object of

the donor's bounty, *ipso facto* and as a matter of law makes the gift one made in contemplation of death, is clearly without merit. Such an argument leads to this absurd conclusion—that although a gift would not be within the statute if made to a stranger under circumstances, which concededly would not render it one made in contemplation of death, nevertheless, if made under identical circumstances to a person who is the natural object of the donor's bounty, such gift would by reason of that fact alone become one in contemplation of death.

The Government urges (Brief, pp. 13, 15, 30) that "the transfer was a mere substitute *pro tanto* for the disposition he had previously made by will". Because of this fact the Government apparently urges that, as a matter of law, the transfer must be deemed "a substitute for a testamentary disposition", which this Court has held it was the purpose of the statute to reach. *Milliken* v. *United States,* 283 U. S. 15, and the *Wells* case, *supra.* However, it is apparent that this Court has used the term "substitutes for testamentary dispositions" with precision. It has recognized that the essential difference between an absolute transfer *inter vivos* and a "testamentary disposition" is the ambulatory character of the latter; and that if, through reserved powers of revocation or amendment, the gift of the beneficial interest under an *inter vivos* transfer remains ambulatory until the death of the donor, such transfer may be deemed a substitute for a testamentary disposition and the property so transferred should not escape the burden of the estate tax. *Helvering* v. *Bullard,* 303 U. S. 297, 301-2; *Porter* v. *Commissioner,* 288 U. S. 436, 444; *May* v. *Heiner,* 281 U. S. 238, 243; *Chase National Bank* v.

*United States*, 278 U. S. 327, 338; *Bullen* v. *Wisconsin*, 240 U. S. 625, 631. And in *Matter of Schmidlapp*, 236 N. Y. 278, the late Mr. Justice Cardozo said:

> "We think this conveyance was so far ambulatory until the death of the donor that rights acquired under it might be taxed as if acquired under a will" (p. 285).

We submit that the essential feature of a testamentary disposition is that it is ambulatory, and that a substitute for a testamentary disposition must include this ambulatory feature or else the "thought of death" must have been the controlling motive for its surrender; or, in other words, the transfer must have been made "in contemplation of death", as defined in the *Wells* case.

***It is therefore submitted that the decision of the Circuit Court of Appeals should be reversed.***

Respectfully submitted,

C. ALEXANDER CAPRON,
CHARLES ANGULO,
PHILIP M. PAYNE,
*Amici Curiae.*

Dated, October 19, 1938.

P. 3. dissent

# SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1938.

The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, Petitioners,
*vs.*
Commissioner of Internal Revenue.

Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[November 7, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

Edwin B. Hendrie of Denver, Colorado, January 26, 1925, executed a will wherein he gave his property, with relatively small exceptions, to trustees to be held for the benefit of his daughter, Gertrude Hendrie Grant, and her children. January 7, 1927, when eighty years old and in good health, he irrevocably conveyed in trust to the Colorado National Bank, securities of large value—perhaps $800,000. The deed among other things provided that the income should be accumulated during the donor's life; after his death and during the life of his daughter Gertrude so much thereof as she asked should be paid to her and the remainder added to the principal; upon her death the corpus should be distributed to her descendants, etc.

Hendrie died July 15, 1932. His 1925 will was duly probated and under it property worth some $900,000 passed. The Commissioner ruled that the 1927 trust was set up in contemplation of death within the meaning of section 302(c), Revenue Act of 1926, as amended,[1] treated the property in the trustee's hands as part of the gross estate, and assessed taxes thereon accordingly.

[1] Revenue Act of 1926, c. 27, 44 Stat. 9:

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, . . ." (U. S. C., Title 26, Section 411.)

The Board of Tax Appeals considered the relevant facts and held the conveyance of 1927 "was not made in contemplation of death within the meaning of the statute as explained in United States v. Wells, 283 U. S. 102."

The Circuit Court of Appeals ruled that the transfer was in contemplation of death, and reversed the Board's decision. We think this was error. The decision of the Board should have been approved.

The court declared—"Each case must be determined by its own facts and circumstances. . . . It is settled law that a finding of fact made by the Board of Tax Appeals will not be disturbed on review if it is supported by substantial evidence. But whether there is substantial evidence to support a finding is a question of law. . . . And a finding not thus supported will be set aside." These statements are in accord with our holdings.

Also it said—"The test lies in the motive for the transfer. If the generating source of the motive is associated with life, the transfer is not made in contemplation of death. But if the generating inducement is associated with death, either immediate or distant, the transfer is made in such contemplation. A gift is made in contemplation of death where the dominant motive of the donor is to make proper provision for the object of his bounty after the death of the donor."

Following a review of the evidence it said—"The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. . . . The purpose was a commendable one, but the generating motive for a transfer made in such circumstances is associated with death."

In the light of the views so stated the court concluded there was no substantial evidence to establish that the transfer was not made in contemplation of death. One judge, dissenting, declared—"It seems clear from the uncontradicted testimony that Mr. Hendrie's gift to his daughter and her children was not made in contemplation of death but in order that he might speculate upon the stock market

for the remainder of his life more actively than he had in the past without fear that the part of his fortune thus given might be lost. He manifested no other intent and purpose in that respect."

There was evidence which the Board thought adequate, and which we deem substantial, to support its conclusion. Dominant purpose was a question of fact for determination by the Board.

The court's opinion seems to rest upon an erroneous interpretation of the term "in contemplation of death." The meaning of this was much discussed in *United States* v. *Wells, supra.* We adhere to what was there said. The mere purpose to make provision for children after a donor's death is not enough conclusively to establish that action to that end was "in contemplation of death." Broadly speaking, thoughtful men habitually act with regard to ultimate death but something more than this is required in order to show that a conveyance comes within the ambit of the statute.

Here, the Board having before it all the circumstances, including the provisions of the will, concluded that they disclosed an effective motive not directly springing from apprehension of death. And as pointed out by the dissenting judge there was substantial basis for that view. Its action is in accord with principles accepted by us in *Shukert* v. *Allen,* 273 U. S. 545, *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, *May* v. *Heiner,* 281 U. S. 238, *McCormick* v. *Burnet,* 283 U. S. 784, *Becker* v. *St. Louis Union Trust Co.,* 296 U. S. 48.

The judgment of the Circuit Court of Appeals must be reversed. The decision of the Board of Tax Appeals is approved.

Mr. Justice REED concurs on the ground that the conclusion of the Board that the transfer was not made in contemplation of death was justified. There was substantial evidence of a life motive and the Board did not find an effective motive in contemplation of death.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

# SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1938.

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| The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, Petitioners, vs. Commissioner of Internal Revenue. | Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit. |

[November 7, 1938.]

Mr. Justice Black, dissenting.

The purpose of Congress in providing that property transferred to a trust should be included in the transferor's gross estate when transferred in contemplation of death[1] was to prevent evasion of the progressively graduated estate tax through the use of trust devices which actually operated as substitutes for testamentary disposition of property.[2] The will made by Mr. Hendrie at the age of seventy-eight in 1925 and the trust agreement substituted for it at eighty (as to a large part of his property) two years later in 1927 were substantially identical as to parties, recipients of his property, amounts, terms and conditions. Neither the will nor the trust agreement permitted any payments to the beneficiaries until the death of Mr. Hendrie.

The stipulated evidence as to expressions by the donor of his motive for making the trust agreement showed that:

He "wanted to transfer about one third of his assets in the interest of his daughter and her heirs so that whatever might happen to his own financial affairs in the future, those persons would be provided for. He said he desired to retain for himself his most speculative securities and to feel free to speculate with that property *during the rest of his life*, but to put the other one-third beyond his own reach and risk. He said he desired and intended to 'play on the market' to a greater extent and in a more speculative way *for the remainder of his life*." (Italics supplied.)

[1] Sec. 302(c), Revenue Act of 1926, 44 Stat. 9.

[2] Milliken v. United States, 283 U. S. 15; United States v. Wells, 283 U. S. 102, 116-17; cf. Tyler v. United States, 281 U. S. 497, 505.

At "one time he stated . . . that his daughter and his grandchildren would be adequately provided for in the event of his, the said Hendrie's death, through the medium of a trust which he had created, regardless of his operations on the Stock Exchange."

In reaching the conclusion that the stipulated facts in this case showed as a matter of law that the trust gift was made in contemplation of the donor's death within the meaning of the congressional act, the court below said in part:

"The trust was not designed to make provision for the beneficiaries during his life. None of the property or the increment thereto was to reach them until after his death. Neither was it designed to enable him to engage in speculation. He could have done that unfettered and unrestrained without the establishment of the trust. But in its absence the property transferred would have been subject to the hazards of speculation. It would have been within reach of creditors if he lost all. The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for them, not during his life, but after his death."[3]

The Board of Tax Appeals did not pass upon conflicting evidence. And there is no indication that the Board believed that any conflicting inferences could be drawn from the stipulated facts. Stating that "the Commissioner relies upon the fact that the income was to be accumulated and added to corpus during the life of the donor and, consequently, the beneficiaries were to receive nothing until after the death of the decedent" the Board did no more than say that they thought "the transfer was not made in contemplation of death within the meaning of the statute as explained in *United States* v. *Wells*, 283 U. S. 102" and that "Therefore, on this point, we hold for the petitioners." That the Board reached its conclusion on this single principle is clearly indicated by its statement that "Principles announced in the cases above listed control this case which is not distinguishable from one or more of those cases where, as here, *income was to be accumulated until after the death of the donor.*" (Italics supplied.)

[3] 95 Fed. (2d) 163.

The decision in *United States* v. *Wells, supra,* is not controlling on the present facts. There the Court held that the gift involved "was the carrying out of a policy long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime. He had consistently followed that policy for nearly thirty years and the three transfers in question were a continuation and final consummation of such policy. In the last transfer such amounts were given to his children as would even them up one with another, in the gifts and advancements made to them.

"That this was the motive which actuated the decedent in making these transfers seems unquestioned."

Here, the donor had never followed any such policy. His will indicated that he was motivated not by a desire to give his children and grandchildren property while he was yet living, but to provide for them after his death. In the *Wells* case, *supra,* 117, this Court said that "the motive which induces the transfer must be of the sort which leads to testamentary disposition". That the motive of the donor in this case was of the kind "which leads to testamentary disposition" is conclusively shown by the facts that the trust agreement was an actual substitute for a previous will; that the sole motive shown in *all* of the evidence was to provide for the donor's children and grandchildren after his death so he would be "free for the rest of his life to speculate in whatever securities he might wish" without subjecting the property intended for his children and grandchildren to "the vicissitudes of his speculations."[4]

Congress has provided that upon review of a judgment by the Board of Tax Appeals the "Courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding

[4] The statute alternatively taxes two types of trust transfers *inter vivos* which may be substituted for wills. If a trust was intended to take effect at death or if a trust was created in contemplation of death, *either* contingency invokes the imposition of the tax. Holdings where the tax has been assessed on the theory that a trust shifted such economic interests at a transferor's death—and not when the trust was set up—that the transfer was intended to take effect at death (Shukert v. Allen, 273 U. S. 545; Reinecke v. Northern Trust Co., 278 U. S. 339; May v. Heiner, 281 U. S. 238; McCormick v. Burnet, 283 U. S. 784; Becker v. St. Louis Union Trust Co., 296 U. S. 48) are not determinative of this case involving an alleged motive in contemplation of death.

pointed out that, in effect, the findings of the lower court showed that

the case for a rehearing, as justice may require."[5] Although t statute indicates an intent on the part of Congress to make t findings of fact of the Board conclusive, this Court holds that su findings are not conclusive unless supported by substantial e dence.[6] This Court has also said that the ultimate finding by Board of Tax Appeals is a "conclusion of law or at least a det mination of a mixed question of law and fact" which is "subj to judicial review and, on such review, the Court may substitute judgment for that of the board."[7] Under this rule—with whic am not in accord—but which governed the Court of Appeals, I lieve that Court correctly decided that the Board had no substan evidence to justify its erroneous ultimate determination of mixed question of law and fact here. For that reason I think judgment should be affirmed.

[5] 44 Stat. 110, 26 U. S. C., ch. 5, § 641(c).

[6] Helvering *v.* Tex-Penn Co., 300 U. S. 481, 490; Helvering *v.* Rankin, U. S. 123, 131; Phillips *v.* Commissioner, 283 U. S. 589, 600.

[7] Helvering *v.* Tex-Penn Co., *supra*, at 491; Helvering *v.* Rankin, *supra*